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# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 432

THE UNITED STATES OF AMERICA, PETITIONER

v.

TILLIE ZAZOVE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIORARI GRANTED DECEMBER 8, 1947.

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1947

# SUPREME COURT OF THE UNITED STATES

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771452—47

[Caption omitted.]

2 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 44–C–917

TILLIE ZAZOVE, PLAINTIFF

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

and

FANNIE BROWN, ANNA SCHWARTZ AND MARY HARRIS, ADDITIONAL DEFENDANTS AND COUNTERCLAIMANTS

*Agreed statement as to record on appeal*

Filed Dec. 9, 1946

Inasmuch as the questions presented by the appeal of Tillie Zazove to the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause can be determined without an examination of all the pleadings, evidence and proceedings in the said District Court, the parties have prepared and signed this statement of the case, showing how the questions arose and were decided in the said District Court, and setting forth only so many of the facts offered and proved, or sought to be proved, as are essential to the decision of the questions by the said Circuit Court of Appeals.

After a disagreement between the plaintiff and the defendant as to the plaintiff's claim for insurance benefits as designated
3 beneficiary in a $5,000 contract of National Service Life Insurance upon the life of Adolph B. Schwartz, the above entitled suit was instituted August 9, 1944. After the cause was at issue, trial by jury was waived, and the cause tried without a jury.

In the pleadings and at the first trial it was contended by the plaintiff that she had stood in loco parentis to the said Adolph B. Schwartz for a period of more than one year prior to his entry into active service in the military service of the defendant. It was in like manner contended by the other parties that as the plaintiff never met the said Adolph B. Schwartz before he became twenty-six years of age, as a matter of law such relationship could not exist and that the plaintiff was not eligible as a beneficiary of said insurance, but that the insurance ought to be paid to his sisters, the third-party defendants and counter-claimants, who were his only surviving relatives within the eligible class.

The court held in the first trial, as a matter of law, that the in loco parentis relationship could not originate between adults

and over the plaintiff's objections, entered a finding and judgment against the plaintiff that she take nothing by her said suit.

It was contended by plaintiff that in the case of a beneficiary or beneficiaries of such insurance thirty or more years of age at the time of the death of the said Adolph B. Schwartz the insurance benefits were payable at such monthly rate as would make the face amount of the $5,000 insurance, with interest, payable in 120 equal monthly installments, and that the regulations of the Veterans' Administration which purported to make such insurance payable in equal monthly installments to be determined by the life expectancy of the first beneficiary or beneficiaries, so that the said face amount, and interest, and no more, would be paid during the life of the said first beneficiary whose actual lifetime coincided with the said life expectancy, amount to an attempt to legislate and are unauthorized and void. It was contended by the United States of America that said insurance was payable in accordance with regulation No. 3450 (b) of the United States Veterans' Administration and the court so decided over the objections of the plaintiff.

The evidence showed that said Adolph B. Schwartz entered said active military service February 3, 1941, and served therein
4 until his death, May 12, 1943. He was born November 1, 1911. While in such military service, on May 7, 1941, he applied for and was granted the said $5,000 contract of insurance and premiums were paid thereon up to and including the month of his death. In his application for said insurance he designated as beneficiary the plaintiff, whose relationship to him he designated as "aunt." He first became acquainted with and went to live in the home of the plaintiff in August, 1937. The plaintiff was born April 12, 1889. At no time after the said Adolph B. Schwartz became acquainted with the plaintiff was he mentally or physically incapacitated to provide for himself.

At the first trial among other documents admitted in evidence on motion of the defendant were the following:

A duly certified copy signed by H. L. McCoy, Director of Insurance, of Sections 3450 and 3451 of the Regulations of the United States Veterans' Administration and also certifying that the monthly installments of $5.51 payable under 240 monthly certain installments include interest of 3% per annum and the monthly installments payable under the life annuity (120 month certain) are calculated as provided by law upon the basis of American Experience Table of Mortality and interest at 3% per annum, the material portions of which regulations so certified are as follows:

3450—Payment To First Beneficiary.—Upon due proof of the death of the insured while a National Service Life Insurance policy is in force, the monthly installments, without interest

which have accrued since the death of the insured (the first installment being due on the date of death of the insured) and the monthly installments which thereafter become payable in accordance with the provisions of the policy, shall be paid to the beneficiary or beneficiaries entitled in the following manner:

(A) If the beneficiary to whom payment is first made is under thirty years of age at the time of the death of the insured, payment shall be made in 240 equal monthly installments at the rate of $5.51 for each $1,000 of such insurance.

(B) If the beneficiary to whom payment is first made is thirty or more years of age at the time of the death of the insured, payment shall be made in equal monthly installments for 120 months certain, with such payment continuing throughout the remaining lifetime of such beneficiary. The amount of the monthly installment for each $1,000 of insurance shall be determined by the age of the beneficiary as of last birthday at the time of the death of the insured, in accordance with the following schedule based upon the American Experience Table of Mortality and interest at the rate of three per centum per annum: (Partial schedule follows)

| Age of beneficiary at date of death of insured | Amount of each monthly installment |
|---|---|
| 30 | $3.97 |
| * * * | * * * |
| 33 | 4.10 |
| 34 | 4.15 |
| * * * | * * * |
| 36 | 4.26 |
| * * * | * * * |
| 39 | 4.43 |
| * * * | * * * |
| 51 | 5.51 |
| * * * | * * * |
| 54 | 5.99 |
| * * * | * * * |
| 83 | 9.61 |
| 84 | 9.61 |
| 85 | 9.61 |

3451—Payment After Death of First Beneficiary.—Upon due proof of death of the first beneficiary after payment has been made of at least one installment, thereafter monthly installments in the same amount shall be paid to the person or persons entitled as beneficiary until all of the installments certain shall have been paid.

The judgment on the first trial awarded the insurance to the counter-claimants instead of the plaintiff, but on appeal of the plaintiff the said judgment was reversed and the cause remanded. The second trial was had by stipulation of the parties on the evidence received at said first trial, and the plaintiff's contentions at the second trial were the same as at the first, but the court thereupon made and entered November 29, 1946, over objections of the plaintiff as to amount findings of fact, conclusions of law and a judgment in words and figures as follows:

6 In the District Court of the United States

*Findings of fact*

This Cause having been tried by the court without a jury by agreement of the parties, the court hereby Finds as facts in said cause:

1. That Adolph B. Schwartz was born on November 1, 1911, and enlisted in the military service of the United States February 3, 1941, and died in such service May 12, 1943; that when he was more than twenty-one years of age and more than one year before he entered into active service in the United States Army, the plaintiff and the said Adolph B. Schwartz entered into a relationship wherein the plaintiff stood in loco parentis to the said Adolph B. Schwartz, and said relationship continued thereafter throughout his life; that on May 7, 1941, the said Adolph B. Schwartz applied for and was granted Five Thousand Dollars ($5,000.00) National Service Life Insurance by the United States of America, effective June 1, 1941, and in his application therefor designated the plaintiff by the name of Mrs. William Zazove as beneficiary thereof; that the said Adolph B. Schwartz never changed said designation of beneficiary and the said insurance was in full force and effect at his death; that the plaintiff filed her claim for said insurance in the Veterans' Administration December 16, 1943, and said claim was denied, and she was notified thereof by letter dated April 27, 1944, from H. L. McCoy, director of Insurance, and by virtue thereof a disagreement exists under Section 617 of the National Service Life Insurance Act.

2. The court further finds the plaintiff was born April 12, 1889.

3. The court further finds that John B. King and Edward H. S. Martin, the plaintiff's attorneys in this cause, have performed services as such attorneys for the plaintiff of the reasonable value of at least ten percent of the amount of the insurance involved in said cause now due or past due and hereafter to become due.

7 *Conclusions of law*

1. From the foregoing facts and in conformity to the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit on the former appeal in this cause, the court concludes that as a matter of law the question of amount of each monthly installment of insurance payable to the plaintiff has been conclusively determined and adjudicated by the said judgment on said former appeal by the failure of said Circuit Court of Appeals to rule otherwise under plaintiff's second assignment of errors, as the sum of Twenty-nine Dollars and Fifty Cents ($29.50) only, as contended by the defendant, and not Forty-eight Dollars and Eight Cents ($48.08), as contended by the plaintiff.

2. The court further concludes that the plaintiff Tillie Zazove is entitled to recover in this suit of and from the defendant United States of America benefits under said insurance, consisting of monthly installments of Twenty-nine Dollars and Fifty Cents ($29.50) per month for one hundred twenty (120) months certain, the first of said installments having become due to her May 12, 1943, and that the payment of said installments shall continue at the same rate throughout her natural life, if she shall live beyond the said one hundred twenty (120) months.

3. The court further concludes that there should be deducted by the defendant United States of America from the said installments whether now or hereafter due to be paid under or in consequence of the judgment in this cause, and paid to the plaintiff's attorneys, John B. King and Edward H. S. Martin, ten per centum of each installment of said insurance, being their fees as such attorneys herein, one-half of said fees to be paid to the said John B. King and one-half of the said fees to be paid to the said Edward H. S. Martin.

*Judgment*

Therefore, it is considered by the court that the objections of the defendant and of the additional defendants and counter-claimants to said findings of fact and conclusions of law, and the objections of the plaintiff to said conclusion of law as to the amount of each monthly installment of insurance, each and
8 all, be and hereby are overruled, and that the plaintiff Tillie Zazove do have and recover of and from the defendant United States of America the sum of One Thousand Two Hundred Sixty-eight Dollars and Fifty Cents ($1,268.50), the total amount of the said accrued monthly installments of insurance at the rate of Twenty-nine Dollars and Fifty Cents ($29.50) per

month, beginning May 12, 1943, to and including the installment thereof due November 12, 1946.

It is Further Hereby Ordered and Adjudged that the defendant United States of America deduct ten per centum of each installment of the insurance to be paid under or in consequence of this judgment, and pay the same in equal portions to the plaintiff's attorneys, John B. King and Edward H. S. Martin, for the services of the attorneys for the plaintiff rendered in this suit, payable at the rate of one-tenth of all back payments and one-tenth of all future payments which may hereafter be paid under or in consequence of this judgment.

It Is Further Hereby Ordered that the counter-claimants take nothing by their counter-claim in this cause.

JOHN P. BARNES, *Judge.*

The plaintiff filed notice of appeal from said second judgment December 9th, 1946, in words and figures as follows:

In the District Court of the United States

*Notice of appeal*

Notice Is Hereby Given that Tillie Zazove, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered in this action on November 29, 1946.

JOHN B. KING,
EDWARD H. S. MARTIN,
*Attorneys for Appellant Tillie Zazove.*

Address: Room 1140, 10 South LaSalle Street, Chicago 3, Illinois.

9 *Points relied upon*

The points to be relied upon by the plaintiff upon her said appeal last mentioned are as follows:

1. The court erred in holding that as a matter of law the question of amount of each monthly installment of insurance payable to the plaintiff has been conclusively determined and adjudicated by the said judgment on said former appeal.

2. The court erred in holding that the plaintiff is entitled to recover monthly installments of insurance of only $29.50, instead of monthly installments of $48.08.

3. The court erred in entering judgment in favor of the plaintiff for an inadequate amount."

JOHN B. KING,
EDWARD H. S. MARTIN,
*Attorneys for Plaintiff, Appellant.*
J. ALBERT WOLL,
*United States Attorney,*
*Attorney for United States of America,*
*Defendant-Appellee.*
By WM. M. LYTLE,
*Attorney, Department of Justice.*

Approved: December 9th, 1946.

BARNES, *District Judge.*

[Clerk's certificates to foregoing transcript omitted in printing.]

12 In the United States Circuit Court of Appeals for the Seventh Circuit

No. 9269—October Term, 1946, April Session, 1947

TILLIE ZAZOVE, PLAINTIFF-APPELLANT
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

*Opinion*

Filed June 6, 1947

Before SPARKS, KERNER, and MINTON, Circuit Judges

MINTON, Circuit Judge. This is the second appeal in this cause. The only question presently involved is the size of the monthly installments the plaintiff is entitled to receive. The statute involved provides (38 U. S. C. A., Sec. 802 (h)):

"Such insurance shall be payable in the following manner:

"(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.

"(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary."

To determine the size of the installments to be paid under subsection (2), the Veterans Administration adopted Regula-
13 tion No. 3450 by which the monthly installment for each thousand dollars of insurance is determined by the age of the beneficiary as of the last birthday at the time of the death of the insured, in accordance with a schedule based on the American Experience Table of Mortality, and interest at the rate of three per cent per annum, with not less than 120 months certain. Under the schedule thus promulgated by regulation, the Veterans Administration determined that since the plaintiff-beneficiary was fifty-four years of age at the time the insured died, she was entitled to a monthly installment of $5.90 per thousand dollars of insurance, and since the amount of insurance here involved is $5,000, the total monthly installment to be paid her was $29.50. With this determination the District Court agreed and entered judgment accordingly. From this judgment the plaintiff has appealed.

It is the position of the plaintiff that since she is over thirty years of age, she is entitled to equal monthly installments for 120 months certain, in other words, divide the face value of the policy, $5,000, by 120 months, with interest properly allowed at three percent, under which calculation the plaintiff was entitled to receive $48.08 each month instead of $29.50.

We agree with the construction placed upon subsection (2) by the plaintiff. It seems to us that this subsection is plain and unambiguous and means what is says. The face value of the insurance, plus interest, is to be paid in equal monthly installments over a period of 120 months certain. Nothing is said in the statute about equalizing the sum over the life expectancy of the beneficiary. The regulation does that. In other words, the regulation sets up a formula different than that prescribed by Congress. The Veterans Administration may by regulation carry out the provisions which Congress lays down in the statute, but it may not alter the provisions prescribed by Congress. Congress declares the law. The Administration carries it out. Miller v. United States, 294 U. S. 435, 439, 440, 55 S. Ct. 440, 79 L. Ed. 977; Campbell v. Galeno Chemical Co., 281 U. S. 599, 610, 50 S. Ct. 412, 74 L. Ed. 1063.

After putting this regulation into effect, the Administrator discovered that in the great majority of cases if the beneficiary should die before the expiration of 120 months on the low schedule of payments equalized over the life expectancy of the beneficiary,
14 the Government would not be required to pay the face amount of the policy, not to mention interest. In fact, in the instant case, 120 months at $29.50 a month would amount to only $3,450 on a policy with a face value of $5,000, plus interest. In other words, the serviceman's beneficiary would not receive

what the serviceman had contracted for. For instance, suppose that a first beneficiary who was thirty years of age when the insured died, lived for only five years. The table provides a monthly payment to the beneficiary at the rate of $3.97 per thousand. The first beneficiary and the alternate beneficiary would receive 120 monthly payments at $3.97 per month, or $476.40, instead of $1,000 with interest at three percent properly calculated.

It will be noted that subsection (2) of the statute if construed as the plaintiff contends, and we think the language of the section clearly dictates this construction, provides that if the first beneficiary should live beyond the 120 months, the Government would be liable to continue the payments until such beneficiary dies, for the statute says, "with such payments continuing during the remaining lifetime of such beneficiary." This provision may compel the Government to pay more than the face of the policy, plus interest. Let us take an extreme case of a first beneficiary thirty years of age and assume that she lives not only the ten following years which, under the plaintiff's method of calculation, would entitle her to $1,153.94 per thousand up to the time she became forty years of age, but that she lives to be eighty years of age, in which event she would receive the same sum of $1,153.94 per thousand each succeeding ten years. Thus the Government would pay not only once but five times the face of the policy, with interest.

By the act of September 30, 1944,[1] Congress amended subsection (2) here involved by adding a provision which
10 allowed the Administrator to offer the insured or the beneficiary an optional settlement that would overcome the unjust settlement provided by Regulation No. 3450 where the beneficiary would not receive the face value with interest. In other words, the amendment authorized the Veterans Administration for the first time to provide by regulation for an equalization of the face value of the contract over the lifetime of the beneficiary, but for not less than 120 months. This amendment provided an election which afforded a way out for the Veterans Administration in its unjust administration of the Act under Regulation No. 3450.

[1] "Sec. 6. Section 602 (h) (2) of the National Service Life Insurance Act of 1940 is hereby amended by substituting a colon for the period at the end thereof and adding the following: 'Provided, That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract less any indebtedness with such payments continuing throughout the lifetime of such beneficiary: Provided further, that such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months, nor in any case in which payments of insurance installments have been commenced prior to the date of this amendatory Act'" (58 Stat. 762–763, 38 U. S. C. A. Sec. 802 (h) (2)).

No one was compelled to take this method of settlement. It was available if deemed advantageous.

As we understand the position of the Government, it is that by passing the above amendment leaving subsection (2) intact but adding a provision for an optional settlement, Congress intended to approve by silence the regulation as it was applied to the plaintiff. We do not think it follows at all that Congress, because of its silence, intended to adopt the Administrator's regulation on the subject. When Congress enacted this amendment, it did not alter the existing provisions of the law in any manner. It supplemented them with the authorization of an optional settlement to, as the Senate Finance Committee said, "authorize payment of meritorious claims." For aught that appears, Congress may have desired to correct the settlements made below the face value of the contract and to retain the settlements to be made in excess of the face value thereof. For the first time Congress authorized an optional settlement for the equalization of the face value of the contract over the life expectancy of the beneficiary. This method of equalization the Veterans Administration had already put into effect by its invalid regulation.

We do not think Congress approved by silence this invalid regulation of the Veterans' Administration, the promulgation of which was a usurpation of legislative power on its part. The Veterans' Administration had equalized the monthly installments not by using the mathematical formula of the statute which divided the face value of the policy, plus interest, into 120 equal installments, but by distributing the payments over the life expectancy of the beneficiary.

We cannot say that Congress did not intend to be generous
with those beneficiaries over thirty years of age who
16 if parents would be at least middle-aged and many of whom
would be quite well up in years and in a great majority of the cases struggling to live, for it is the sons of the poor who constitute the majority of the fighting forces. Or the beneficiaries might be young widows with small children whose ten years of monthly payments would end at the most needed time. If Congress chose to be generous, we know of no rule of law that authorizes the Veterans' Administration to inaugurate an economy program. Even if Congress passed the act unwisely, we know of no authority in law that authorizes the Veterans Administration, or even the courts, to correct it. Congress is the judge of its own wisdom, limited only by the Constitution. The generosity of Congress to veterans has never been admitted, officially, to be unwise. The language Congress used was plain. The regulation distorted the language. When Congress sought to correct an unfair settlement

arising under such distortion, it does not follow that it approved by silence the regulation which distorted the statute that was on the side of generosity. Silence must be so compelling as to lead to no other reasonable construction before we are justified in holding that Congress approved an invalid regulation by mere silence. Girouard v. United States, 328 U. S. 61, 69, 70, 66 S. Ct. 826, 90 L. Ed. 776; Ebert Et Al. v. Poston, 266 U. S. 548, 45 S. Ct. 188, 69 L. Ed. 435. See Justice Rutledge's concurring opinion in Cleveland v. United States, 329 U. S. 14, 21, 67 S. Ct. 13, 17, 18, 91 L. Ed. 1.

The judgment of the District Court is reversed and the cause remanded with directions to proceed in accordance with this opinion.

*Dissenting opinion*

KERNER, Circuit Judge, dissenting.

What was the purpose of Congress in 1944 when it amended subsection (2) of the Act? Granted, that under Regulation No. 3450 if an over-thirty beneficiary (for example, one fifty-four years of age) died before the expiration of the 120 months certain, or even a short time thereafter, he would not receive the face amount of the policy. Such a procedure was directly contrary to the terms of the contract and defeated the intention of the deceased service man. The amendment to subsection (2) changed this patently unfair administration of the Act, and provided an alternative mode of payment at the election of the insured or the beneficiary, consisting of a refund life payment which guaranteed
17 the payment in installments of the full face value of the insurance contract. That it was the intent of Congress to guarantee payment of full face value, even though the beneficiary had to elect such a method, is inherent in the amendment itself.

Whether the amendment can be considered as Congressional approval by silence of Regulation No. 3450 seems immaterial in view of what the amendment does. It permits the beneficiary, if she so elects, to receive the face amount of the contract. She is entitled to and can receive full payment. Hence plaintiff's contention that she is entitled to full payment with interest every ten years is without force. It seems to me that to concur in plaintiff's contention would do violence to the spirit, if not the letter of the statute, which places a limit of $10,000 on the amount of the insurance which could be issued to any one person (§ 602 (q) 38 U. S. C. A. § 802; § 603, 38 U. S. C. A. § 803).

I would affirm the judgment

18 In United States Circuit Court of Appeals

Before Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. OTTO KERNER, Circuit Judge; Hon. SHERMAN MINTON, Circuit Judge.

9260

TILLIE ZAZOVE, PLAINTIFF-APPELLANT

*vs.*

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

*Judgment*

June 6, 1947

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court with directions to proceed in accordance with the opinion of this Court filed this day.

In United States Circuit Court of Appeals

[Title omitted.]

*Order extending time*

June 20, 1947

On petition of counsel for the defendant-appellee, it is ordered that the time for filing a petition for rehearing herein be, and is hereby extended to and including July 6, 1947.

*Recital as to petition for rehearing and answer thereto*

And afterwards, to wit: On the seventh day of July 1947, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said petition for Rehearing is not copied herein.

And afterwards, to wit: On the tenth day of July 1947, there was filed in the office of the Clerk of this Court, an Answer to the said Petition for Rehearing, which Answer to the Petition for Rehearing is not copied herein.

19 In United States Circuit Court of Appeals

[Title omitted.]

*Order denying petition for rehearing*

Aug. 7, 1947

It is ordered by the Court that the Petition for Rehearing of this cause be, and the same is hereby, denied.

20 [Clerk's certificate to foregoing transcript omitted in printing.]

21 Supreme Court of the United States

*Order allowing certiorari*

Filed December 8, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 52662. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 432. The United States of America, Petitioner vs. Tillie Zazove. Petition for writ of certiorari and exhibit thereto. Filed November 6, 1947. Term No. 432 O. T. 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947